05-858 OCT 20 2006

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No. _____

In The
Supreme Court of the United States

Alson Alston,
Petitioner,

v.

City of Philadelphia Zoning Board of Adjustment,
Westrum Urban, LLC,
Respondents.

On Petition for Allowance of Appeal
To The Pennsylvania State Supreme Court

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF THE PETITIONER ALSON ALSTON

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QUESTIONS PRESENTED

1. Did the Pennsylvania Supreme Court consent to a due process violation, under the Fifth and Fourteenth Amendments to the United States Constitution, by crafting a ruling in direct violation of *Lee v. Kemna*, 534 U.S. 362 (2002), when it let stand a Commonwealth Court decision dismissing Petitioner's zoning appeal, due to an apparent violation of Pa. Rule of Appellate Procedure 1925(b), given that Petitioner had agreed to be constrained in a manner that rendered the apparent violation of the rule moot?

2. Did the Pennsylvania Supreme Court consent to an equal protection violation, under the Fourteenth Amendment to the United States Constitution, when it let stand a Commonwealth Court decision dismissing Petitioner's (civil) zoning appeal, due to an apparent violation of Pa. R.A.P. 1925(b), given that Commonwealth Court cited *Commonwealth v. Lord*, 719 A.2d 306 (Pa. 1998), which the Pennsylvania Supreme Court had overturned for **criminal** cases involving Pa. R.A.P. 1925(b) violations, but apparently **not civil** matters, just three weeks prior to that Supreme Court's denial of Petitioner's Petition for Allowance of Appeal in this matter?

3. Did the Pennsylvania Supreme Court consent to due process and equal protection violations, under the Fifth and Fourteenth Amendments, to the United States Constitution when it let stand a Commonwealth Court decision dismissing Petitioner's zoning appeal due to an apparent violation of Pa. R.A.P. 1925(b), given that the lower court decisions permitted a zoning decision to stand even though that decision resulted from a failure to notify the community of the relevant zoning hearing and that the level of due process in Common Pleas court was based on the race of the community?

PARTIES TO THE PROCEEDINGS

Only the parties named in the caption are parties to these proceedings.

Respondent Westrum Urban, LLC appears to be a wholly owned subsidiary of Westrum Development Corporation (PA Entity ID# 945147).

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CITATIONS OF REPORTS OF OPINIONS BELOW

The opinion of Common Pleas Court, affirming the zoning decision, is unpublished.

The opinion of Commonwealth Court, affirming the Common Pleas Court decision, filed July 9, 2005, is unpublished.

The Pennsylvania Supreme Court, affirming the Commonwealth Court decision, did not issue an opinion.

STATEMENT OF JURISDICTION

This Petition seeks review of a Supreme Court of Pennsylvania order denying Petitioner's Petition for Allowance of Appeal on April 19, 2005, an application for reconsideration being later denied by order dated June 2, 2005. This Petition was due to be filed in this Court on or before August 31, 2005. Honorable David H. Souter, pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 13.1, granted an extension to and including October 10, 2005 and, later, moved that extension to October 20, 2005.

The United States Supreme Court has jurisdiction over final judgments or decrees rendered by the highest court of a State, pursuant to 28 U.S.C. §1257(a). This matter, therefore, is properly before this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

> No person ... shall be deprived of life, liberty, or property, without due process of law....

The Fourteenth Amendment provides, in relevant part:

> Section 1.
> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Philadelphia Zoning Board of Adjustment ("ZBA") Regulation #3 defines prior notice in a zoning matter in the City of Philadelphia as:

> Notice of an appeal shall be posted by the applicant on each street frontage of the premises with which the appeal is concerned, for at least twelve (12) consecutive days immediately prior to and including the day of the hearing before the Board.

ZBA Regulation #17 states:

> A decision of the Board which was obtained as the result of false or concealed information shall vest no rights and shall be set aside.

STATEMENT OF THE CASE

There are three constitutional issues involved in this case. First, Petitioner maintains that the Pennsylvania Supreme Court erred in affirming the lower court's ruling that Petitioner was not entitled to relief because his attorney, Methuselah Bradley, IV, had failed to file the Concise Statement of Matters Complained Of, pursuant to Pa.R.A.P. 1925(b) and controlled, at the time of the lower court ruling, by *Commonwealth v. Lord*, 719 A.2d 306 (Pa. 1998). The Pennsylvania Supreme Court neglected to consult *Lee v. Kemna*, 534 U.S. 362 (2002), which clearly demonstrates how due process claims become relevant even when well-established state court rules are violated.

Secondly, the Pennsylvania Supreme Court committed an equal protection violation when it reversed *Lord* for criminal parties – just three weeks prior to denying Petitioner's Petition for Allowance of Appeal – in *Commonwealth v. Halley*, 870 A.2d 795 (Pa. 2005), but did not extend those protections to civil parties.

Third, the Pennsylvania Supreme Court committed or extended due process and equal protection violations when affirming the dismissal of the lower courts because the lower courts p[illegible]ted the results of a zoning hearing to stand where tha[illegible]ning hearing, according to a zoning inspector, occurred without proper notice to the community and the level of enforcement of that notice requirement (ZBA Regulation #3) was based on the predominate race of a community.

These federal questions were raised by Petitioner in his filings to Common Pleas Court, both his motions and briefs to Commonwealth Court, and his petitions and applications to the Pennsylvania Supreme Court. No court or administrative agency addressed them directly.

BACKGROUND OF THE PENNSYLVANIA STATE SUPREME COURT JUDGMENT

Before the Pennsylvania Supreme Court, Petitioner filed a Petition for Allowance of Appeal, Application for Stay, Motion for Expedited Consideration, and an Application for Reconsideration of a Petition for Allowance of Appeal. All were denied without offering any opinion. Petitioner has no direct information regarding why his pleadings were rejected.

All of the federal questions of interest were preserved at the state Supreme Court level. In his Petition for Allowance of Appeal, submitted to State Supreme Court, Petitioner wrote:

- "Is there an equal protection violation in the instant case, given that the unlawful zoning approval continued a series of harmful actions taken by the city including that the city (a) removed the Keystone Opportunity designation from the area containing the

site of the proposed Westrum development and deprived the surrounding African-American community of its benefits; (b) removed at least one African-American family from a Philadelphia Housing Authority home so the land could be given to Westrum; (c) removed the cherished African-American cowboys from nearby stables so the land could be transferred to Westrum – all without the consent of this 94% African-American community, all to the benefit new residents, who will likely be high-income whites? Would not allowing limited discretion in any interpretation of Rule 1925(b) prevent this **equal protection violation** from being made permanent?" [Emphasis added.]

- "Is there an equal protection violation stemming from the fact that the trial court judge dismissed this matter and thereby condemned this African-American community to accepting a development it was never permitted to speak out against at the zoning hearing or a Common Pleas hearing, while in a nearly identical matter (*Fairmount Civic Association, et. al. v. 27th & Girard LP, et. al.*, Common Pleas Case ID 020900144) two years earlier, often considered led by an almost exclusively white organization, the Fairmount Civic Association, the same trial court judge ruled in their favor? In both cases, a ZBA inspector reported that there were posting violations. Would not allowing limited discretion in any interpretation of Rule 1925(b) prevent this **equal protection violation** from being made permanent?" [Emphasis added.]
- "The Pennsylvania Supreme Court is the court of last resort to correct the systemic, deeply rooted local schemes that currently deprive the community of its rights under statute, as well as its **due process and equal protection rights**. However, this cannot occur,

at least in this urgent matter, if a Rule of Appellate Procedure is enforced ***without exception***." [Emphasis added.]

- "If *Lord* is interpreted and enforced, strictly and without exception, it must be held as violating the ***due process clauses*** of the U.S. Constitution." [Emphasis added.]
- "If *Lord* is interpreted and enforced, strictly and without exception, it must be held as violating the ***equal protection*** clauses of the U.S. Constitution." [Emphasis added.]

In his Application for Reconsideration of Petition for Allowance of Appeal, submitted to State Supreme Court, Petitioner wrote:

- "This concealment, misrepresentation or error permitted the hearing to continue even though there was a violation of ZBA Regulation #3. By ZBA Rule #17, the resulting approval ***shall vest no rights and shall be set aside***. ... The prejudice caused by these actions has denied Petitioner **due process and equal protection rights**. These rights can be restored only by this Court." [Emphasis added.]
- "Petitioner asks that the Court remand the matter to Commonwealth Court or approve the Petition for Allowance of Appeal, intervening to restore Petitioner's **due process and equal protection rights** under the United States and Pennsylvania Constitutions." [Emphasis added.]

No opinion or order by the state Supreme Court addressed any of these constitutional issues directly.

THE PROCEEDINGS BELOW

1. Chronology

This is an appeal of a zoning matter with significant implications for an overwhelmingly African-American, economically depressed community, as well as the City of Philadelphia, Commonwealth of Pennsylvania and the entire nation.

Westrum Urban, LLC ("Westrum") desires to build a 144-unit, 100% market-rate luxury town home development in one of Philadelphia's poorest communities, North Philadelphia. The City of Philadelphia believes that the new development will spur economic revitalization of the area.

At an October 15, 2003 community meeting (and a later June 22, 2004 community meeting), community members, many of whom were or have since become members of the African-American Business & Residents Association (AABRA), spoke out strongly against the development, believing it would lead to significantly higher property taxes; force significantly higher rents; yield increased racial tensions; promote large scale displacement of the elderly, others on fixed incomes, the poor; would not provide quality long-term employment for current residents; and that it would ***in no manner*** benefit the existing community.

Petitioner Alson Alston is the President of AABRA.

On November 24, 2003, Respondent Westrum filed a Petition of Appeal to have its request for zoning variances heard before the Philadelphia Zoning Board of Adjustment (ZBA). The hearing was scheduled for January 7, 2004.

On December 29, 2003, a ZBA inspector went to the proposed site and observed that ***none of the four required zoning notice signs were posted***. She recorded her findings on an official ZBA Inspector's Report.

On January 7, 2004, Westrum's case was heard before the ZBA. Only the Petitioner and two other community members attended the hearing, contending that there were inadequate zoning notice postings.

As a result of that posting issue, Petitioner could only attend the hearing by temporarily closing down his family's contract postal unit. As well, Petitioner was forced to leave ***before being able to offer testimony*** so that he could tend to his mentally retarded niece, who was scheduled to be dropped off at the postal unit in the early afternoon.

One of the other community members brought the posting issue to the attention of the ZBA. However, ZBA Chairman David Auspitz stated that the ZBA inspector went to the site on "December 29th" and that the inspector found "no problem" with the posting. This, however, was ***exactly the opposite*** of what the zoning report indicated.

The Chairman, at the start of the session, stated ***on the record*** that there was a "posting problem" with the property. This is in direct contradiction to his statements once the hearing for the subject property commenced.

The Chairman clearly committed perjury, but this action permitted the hearing to continue, in violation of ZBA Regulation #3.

On January 12, 2004, the ZBA granted approval to Westrum to build its town homes.

On February 6, 2004, Petitioner filed an appeal in Common Pleas Court. On March 2, 2004 and March 22, 2004, Respondents City of Philadelphia and Westrum filed Motions to Quash and related items.

On April 12, 2004, Petitioner, acting ***with*** counsel, filed an Answer to the Motions to Quash and also filed his brief.

On April 29, 2004, the trial court dismissed Petitioner's appeal, despite the fact that the controlling legal authority on matters in which zoning notices are not posted